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# European Law and the Inapplicability of the 'Speciality Principle'

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## Abstract

*This article considers to what extent European law invites – or requires – inapplicability of the so called 'speciality principle' in Dutch administrative law. I shall be concentrating on the question to what extent an administrative authority considering whether or not to grant a permit is permitted, or required, to take public interests into account other than those of the permit system in question, and specifically those based on European law. More particularly I will be discussing whether an administrative authority is permitted, or even required, to refuse a permit or other decision on the ground that it is contrary to European law obligations, even when the objectives of the applicable European law are broader than the assessment framework laid down by the national legislation on which the decision is based. I will also be referring to the opposite situation: Is an administrative authority permitted, or perhaps required, to grant a permit or other decision, despite the constraints of the assessment framework of national law, in order to avoid taking a decision that contravenes European law?*

## I Introduction

Government should serve the public interest, but within bounds set and exercising rights and powers conferred by the legislature. This clearly demonstrates the direct connection between the principle of legality and democracy. Nevertheless, the principle of legality would have little effect if the legislature were to confer unlimited or virtually unlimited rights and powers on the administration to further the public interest. This is why these rights and powers are specifically defined and are conferred to attain specific objectives. Dutch administrative law, for example, is based on the principle that public authorities do not have *general* powers to promote the public interest, but only *specific* – objective-related – powers. This is expressed most clearly in the prohibition of *détournement de pouvoir* (abuse of power) in Article 3:3 of the *Algemene wet bestuursrecht* (General Administrative Law Act, *Awb*), which states: 'An administrative authority shall not use the power to make an order for a purpose other than that for which it was conferred.'<sup>1</sup> This means that when exercising a power an administrative

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<sup>1</sup> Other 'traces' of this can be found in e.g. Article 3:4.2 *Awb*: 'When making an order the administrative authority shall weigh the interests directly involved in so far as no limitation on this duty derives from a statutory regulation or the nature of the power being exercised.'

authority will have to consider the purpose for which that power was conferred, which often emerges from the legislation conferring the power.<sup>2</sup>

In short, when exercising public law powers administrative authorities may not further public interests other than those with a view to which the power was conferred.<sup>3</sup> In Dutch administrative law this is known as the 'speciality principle'. The decision of the *Afdeling bestuursrechtspraak Raad van State* (Administrative Jurisdiction Division of the Council of State) in the *Maasdriel* case will serve as an example.<sup>4</sup>

The mayor of Maasdriel had refused to grant a local hunting society a permit to shoot clay pigeons, required under a municipal bylaw. He refused the permit because he felt that granting it would mean acting contrary to both the *Flora- en Faunawet* (Flora and Fauna Act) and the *Wet wapens en munitie* (Weapons and Munitions Act). The purpose of the municipal permit system is to protect public order. The *Raad van State* held that the interests served by the two acts were not so closely linked with the interests on which the grounds named in the bylaw for refusing a permit were based that 'the mere circumstance that the intended use of the permit is incompatible with the *Flora- en Faunawet* or the *Wet wapens en munitie* should be a reason to refuse this permit.' In other words, the mayor's powers could only be used in the context of protecting public order and not to serve conservation interests (*Flora- en Faunawet*) or to regulate the use of firearms (*Wet wapens en munitie*).

Nevertheless, one wonders how the *Raad van State* would decide if the permit were contrary to the directly effective rule in Article 6(3) of the EC Habitats Directive<sup>5</sup> or were otherwise contrary to European law. Does European law require that the speciality principle be disregarded in such a situation?

This question is largely ignored in the Dutch literature on administrative law. In the most important book on the speciality principle, *Schlössels* points out that primary and secondary EC law can of course influence the objectives of national legislation conferring powers.<sup>6</sup> It goes without saying,

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Cf. at European level Article 5 EC: 'The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.' In the literature this is referred to as the 'principle of conferral'.

<sup>2</sup> Cf. e.g. Article 8.10 *Wet milieubeheer* (Environmental Management Act): 'A licence may be refused only in the interests of environmental protection.'

<sup>3</sup> L.J.A. Damen *et al.*, *Bestuursrecht 1* (Den Haag 2005), p. 60.

<sup>4</sup> *Raad van State* 29 April 2003, LJN: AF8028. The Administrative Jurisdiction Division of the Council of State is the country's highest administrative court with general jurisdiction.

<sup>5</sup> Directive 92/43; Cf. on the direct effect of Article 6(3), ECJ Case C-127/02 *Waddenvereniging and Vogelbeschermingsvereniging* [2004] ECR I-7405.

<sup>6</sup> R.J.N. Schlössels, *Het specialiteitsbeginsel* (Den Haag 1998), pp. 8-9.

he says, 'that a national objective-related administrative power should where appropriate be exercised in conformity with the rules on the application of Community law. For example, under certain circumstances the national legislation conferring the powers may have to be interpreted so as to conform with a directive.' Disappointingly, he observes in the following sentence that he will not be discussing this further.

This article considers to what extent European law invites – or requires – inapplicability of the speciality principle in Dutch administrative law. I shall be concentrating on the question to what extent an administrative authority considering whether or not to grant a permit is permitted, or required, to take public interests into account other than those of the permit system in question, and specifically those based on European law. More particularly I will be discussing whether an administrative authority is permitted, or even required, to *refuse* a permit or other decision on the ground that it is contrary to European law obligations, even when the objectives of the applicable European law are broader than the assessment framework laid down by the national legislation on which the decision is based. I will also be referring to the opposite situation: Is an administrative authority permitted, or perhaps required, to *grant* a permit or other decision, despite the constraints of the assessment framework of national law, in order to avoid taking a decision that contravenes European law?

## 2 Applicability where there is a Specific Statutory System

Let us return to the case outlined in the introduction. What if granting the permit to shoot clay pigeons were contrary to Article 6(3) of the Habitats Directive? Would the mayor have been right to refuse it then? Bear in mind that the Habitats Directive was transposed into Dutch legislation in the *Natuurbeschermingswet* (Nature Conservation Act) and the *Flora- en Faunawet*. It seems to me indisputable that to the extent the protection of habitats in the Netherlands required by European law is extended within the framework of the *Natuurbeschermingswet* and/or the *Flora- en Faunawet* – and this legislation is a full and precise implementation of the Habitats Directive – there is no need to involve Article 6(3) in the assessment framework of the local bylaw. Of course, the problem is solved if a permit to shoot clay pigeons is required under the *Natuurbeschermingswet* because of the possible effects on a special protection area. In that case there would be no conceivable reason to take directly effective European law into account when applying local legislation. Proper application of the *Natuurbeschermingswet* and/or the *Flora- en Faunawet* would ensure that nothing was done that would contravene European law. Problems only arise if a permit is *not* required under either of these laws. In that case, other means will have to be

found, based on some other statutory system, which will make it possible to take a different decision and so ensure that European law is not contravened.

European law does not require that an administrative authority takes *all* directly effective European law into consideration for *every* decision it makes. Certainly, Article 6(3) of the Habitats Directive must be observed, but from a European law point of view it is wholly irrelevant whether this is done by means of local or regional legislation or through national legislation such as the *Natuurbeschermingswet* or the *Flora- en Faunawet*. In other words, as long as the fulfilment of European law obligations can be guaranteed by or pursuant to provisions of a legislative system, that is – from a European law point of view – sufficient.

The case law of the Dutch *Raad van State* seems to reflect the same view.<sup>7</sup> Consider, for example, a decision concerning the appeal of an environmental organisation against a permit granted under the *Natuurbeschermingswet* to plant and then harvest mussels and oysters from Ireland and the United Kingdom in the Eastern Schelde, or Oosterschelde, a national conservation area. According to the decision, the administrative authority primarily took the view that to refuse the permit would be contrary to the free movement of goods (Article 28 EC Treaty). The question that was at issue was therefore whether the assessment framework of the *Natuurbeschermingswet*, designed to protect nature, should be extended on European law grounds in order to permit the economic and market interests of Article 28 to play a part in the decision whether or not to grant a permit under the *Natuurbeschermingswet*. The *Raad van State* ruled that this was not necessary, because a permit to plant mussel seed was also required under the *Visserijwet* (Fisheries Act) and Article 28 EC could be considered in the context of that procedure.<sup>8</sup> It observed that the case *exclusively* concerned aspects relating to the *Natuurbeschermingswet* and the scope of Article 6(3) of the Habitats Directive and that there was no place for review in the light of Article 28 EC. In other words, the assessment framework of the *Natuurbeschermingswet*, focusing explicitly on nature conservation, was not extended by Article 28 EC. In this case there was no European law need for this, as the interests Article 28 EC was intended to protect were safeguarded by the *Visserijwet*.

Even clearer is the case law of the *Raad van State* on the question to which statutory system the assessment framework of the Habitats Directive should be reckoned. The Netherlands was long in default regarding implementation of the Habitats Directive. Ultimately this resulted in the inclusion of a special section in the *Natuurbeschermingswet*, under which activities with possible significant effects on a special protection area would have to be subjected to a 'special' Habitats Directive test. Under Article 19d of the *Natuurbeschermingswet* it is prohibited, given the aim of preventing the deterioration of natural habitats and the habitats of species and the disturbance

<sup>7</sup> *Raad van State* 22 March 2006, LJN: AV6289.

<sup>8</sup> Cf. *Raad van State* 26 February 2003, [2003] *M&R*, nr. 92.

of the species for which the areas have been designated, to carry out projects or other plans which could have such an effect on those habitats or species without a provincial permit or without observing any regulations or restrictions imposed by such a permit. According to the *Raad van State* it was the intention of the legislature when it passed this provision to create an exclusive assessment framework and there is therefore no discretion to involve the assessment framework of the Habitats Directive in other statutory permit systems such as those under the *Wet milieubeheer* (Environmental Management Act), the *Woningwet* (Housing Act), or the *Wet op de Ruimtelijke Ordening* (Spatial Planning Act).<sup>9</sup>

### 3 Inapplicability as a Consequence of the Requirement of Consistent Interpretation?

As we know, administrative courts and administrative authorities are obliged to interpret national law as far as possible in conformity with European law.<sup>10</sup> It is hardly surprising that this requirement of consistent interpretation can result in a change in the administrative assessment framework.

For example, it emerged from a decision of the *Raad van State* that Directive 2001/18 on the deliberate release into the environment of genetically modified organisms had not been transposed into Dutch law, specifically the *Wet milieugevaarlijke stoffen* (Environmentally Dangerous Substances Act, *Wms*).<sup>11</sup> Under the *Wms*, authorisation had been granted for small-scale trials with flowering genetically modified rape. Pursuant to the second paragraph of Article 26 *Wms*, the authorisation could only be refused 'in the interest of the protection of man and the environment'. According to the court this statutory framework provided sufficient basis for the court to interpret in the light of the directive. The obligations set out in the directive, including the precautionary principle and the duty to carry out a specific environmental risk assessment in accordance with the criteria of Annex II of the directive, were 'read into' the national law. Clearly, this means that applicants are confronted with obligations arising out of a directive that has not been transposed.

However, the possibilities of consistent interpretation are limited. It is a method that is above all appropriate when the European assessment framework is in effect an extension of the existing assessment framework of the national statutory system. However, it is not advisable to take consistent interpretation too far. In any event, it will *not* produce an extension of the

<sup>9</sup> *Raad van State* 21 February 2007, LJN: AZ9028.

<sup>10</sup> Cf. J.H. Jans, R. de Lange, S. Prechal, R.J.G.M. Widdershoven, *Europeanisation of Public Law* (Groningen 2007), in particular Chapter IV.

<sup>11</sup> *Raad van State* 28 June 2004, [2004] *M&R*, nr. 104 (with note by Jans).

assessment framework where the assessment framework provided for by the national statutory system is *exclusive*.

Illustrative in this context is a decision of the *Raad van State* on possible consistent interpretation of the Dutch environmental legislation in the light of Article 9(4) of the IPPC Directive, at least in relation to agricultural installations.<sup>12</sup> The case concerned an environmental permit granted for the keeping of several thousand chickens and several hundred pigs. A local resident contested the permit, relying among other things on Article 9(4) of the IPPC Directive. The ammonia deposits made possible by the permit were allegedly incompatible with the directive's requirement that 'best available techniques' should be applied. The court, having established that the IPPC Directive did apply in the case, first examined whether the Dutch environmental legislation could be interpreted in conformity with the directive, in other words whether the assessment framework of the IPPC Directive could be 'read into' the existing Dutch environmental legislation. However, in this case the legislation allowed the authorities no discretion whatever to refuse the permit or to apply the more stringent BAT requirements of the directive. Under the national legislation a permit to keep livestock could not be refused for reasons connected with ammonia deposits if the deposits that might be caused on the nearest area sensitive to acidity did not exceed the value set by law. In this case, the ammonia deposits remained below the statutory limit and so the permit had to be granted. As regards the possibility of interpreting the law in conformity with the directive, the *Raad van State* observed that the national legislation in question constituted the 'exclusive assessment framework' for assessing the ammonia deposits of livestock farms, so that there was no room to apply insights of environmental hygiene connected with ammonia deposits other than those contained in the legislation. The conclusion was therefore inevitable: the national legislation allowed 'no room to prescribe emission limit values based on best available techniques'.<sup>13</sup>

Another example of a statutory system for which the assessment framework cannot be extended by means of consistent interpretation concerns the granting of building permits. Article 44(1) *Woningwet* provides: 'A normal building permit may only and must be refused if: [...]' There follows an exhaustive statement of a number of grounds for refusing a permit. In my view the exhaustive, mandatory system of the *Woningwet* precludes extension by the assessment framework of, for instance, the IPPC Directive or the air quality directives. Consistent interpretation cannot change an *exhaustive* system into one that is *non-exhaustive*. In fact, this would amount to a *contra*

<sup>12</sup> *Raad van State* 13 November 2002, [2003] *M&R*, nr. 39.

<sup>13</sup> Nor is consistent interpretation an option, according to the Netherlands Supreme Court (*Hoge Raad*), even if the national statutory framework would in itself allow it, if the legislature has during the legislative process, for example in explanatory memorandums, unambiguously expressed the deliberate intention of having the national regulations depart from what the directive requires or leaves free. *Hoge Raad* 10 August 2007, LJN: AZ3758.

*legem* interpretation of Article 44, as 'may only and must be refused' would then have to be interpreted as 'may, *inter alia*, be refused'. Such an interpretation would be unacceptable in the light of the principle of legal certainty and would almost certainly not be allowed.<sup>14</sup>

A final example of the limited possibilities of consistent interpretation is the following. From a case of the *Raad van State* it may be implied that the assessment framework that provincial authorities have to apply when approving municipal zoning plans cannot be interpreted so as to conform with Article 6(2) of the Habitats Directive. The case concerned an appeal against approval by the provincial authorities of North Holland for the zoning plan on the island of Texel. Part of the area was designated a national conservation area and part was not. The *Raad van State* ruled that for the part designated a national conservation area the protection required by the Habitats Directive was assured by consistent interpretation of the *Natuurbeschermingswet*. However, for the part that did not fall under the protection of the *Natuurbeschermingswet* the *Raad van State* ruled that it saw no possibility of consistent interpretation, as there were no generally binding rules intended to implement the obligations arising under Article 6(2) of the directive. The lack of national legislation which could be interpreted in conformity with the directive made it impossible to take this route.

All that remains as a possible means of circumventing the speciality principle in such a situation, where it is impossible to apply consistent interpretation, is the direct effect of European law.<sup>15</sup>

#### 4 Inapplicability by Means of Directly Effective Provisions?

##### *Reliance on European law by interested third parties?*

That 'third parties' (including interest groups such as environmental organisations) can rely on directly effective provisions of European law before administrative courts, in addition to the applicant, is generally recognised in Dutch administrative law.<sup>16</sup> Successful reliance results in annulment of the contested decision. I am aware of no example of case law in which a third party was denied reliance on directly effective European law because this was precluded by the statutory assessment

<sup>14</sup> Cf. on *contra legem* and consistent interpretation Case C-105/03 *Pupino* [2005] ECR I-5285.

<sup>15</sup> Here the Council of State applied an order of preference: first examine whether consistent interpretation is possible and only when this proves not to be the case consider direct effect; cf. *Raad van State* 13 November 2002, [2003] *M&R*, nr. 39 and most recently *Raad van State* 5 September 2007, 200606758/1. Cf. also ECJ Case C-208/05 *ITC* [2007] ECR I-181, para. 70. See also the contribution of Ortlep & Verhoeven to this volume of *REALaw*.

<sup>16</sup> Cf. J.H. Jans, R. de Lange, S. Prechal, R.J.G.M. Widdershoven, *Europeanisation of Public Law* (Groningen 2007), in particular Chapter III.



framework. However, there are several – though not many – examples which justify the cautious conclusion that the speciality principle can indeed be rendered inapplicable as a result of third party reliance on directly effective European law. This emerges, albeit implicitly, from a decision of the *Raad van State* concerning the statutory system of permits required under the *Wet op de Ruimtelijke Ordening*.<sup>17</sup>

The case concerned a permit granted by a local authority to lay three artificial grass fields to replace three natural grass fields. Interested third parties objected, relying, among other things, on the Habitats Directive. It should be added that the case arose before the inclusion of the special and exclusive Habitats Directive test in the *Natuurbeschermingswet* (see section 2 above). Allegedly, the permit could have adversely affected the nearby conservation areas, which were listed among the habitat areas the Dutch Government had sent the Commission. However, at the time of the proceedings the Commission had not yet designated the areas as areas of Community interest. This meant that the European law protection of these areas could not be based directly on Articles 6(2) to (4) of the Habitats Directive, but had to be based on the general ‘good faith’ requirement not to take any measures that would jeopardise attainment of the objectives of the Habitats Directive.<sup>18</sup> Like the *Woningwet*, discussed above, which provides for an exhaustive, mandatory list of grounds for refusing to grant a building permit, the *Wet op de Ruimtelijke Ordening* provides an exhaustive, mandatory list of grounds for refusing to grant a planning permit. It will be clear that this system also allows no room to refuse a permit on grounds of possible conflict with the European law good faith requirement. Nevertheless the *Raad van State* explicitly considered whether the laying of artificial grass fields was an activity by which attainment of the objectives of the conservation of natural habitats and wild flora and fauna might be jeopardised. It thereby implicitly acknowledged that it may annul a permit that contravenes European law, even if the objectives of the European law in question are outside the scope of the national assessment framework.

Indeed, it has been pointed out that European law may also result in the exhaustive, mandatory system of the *Woningwet* being disappplied and a building permit being refused, despite the fact that all the criteria mentioned in Article 44 as necessary for a permit to be granted are fulfilled.<sup>19</sup> In this case not by means of consistent interpretation, but by direct effect. The authors give the fictitious example of the construction of a car park. If a permit were refused because a European law environmen-

<sup>17</sup> *Raad van State* 16 March 2005, LJN: AT0540.

<sup>18</sup> ECJ Case C-117/03 *Societa Italiana Dragaggi* [2005] ECR I-167. This involves application of the ‘Inter-Environnement’ doctrine; ECJ Case C-129/96 *Inter-Environnement Wallonie ASBL v. Région wallonne* [1997] ECR I-7411.

<sup>19</sup> P.J.J. van Buuren, Ch.W. Backes, A.A.J. de Gier & A.G.A. Nijmeijer, *Hoofdlijnen ruimtelijk bestuursrecht* (Deventer 2006), p. 198.

tal quality requirement was exceeded, it could be said that the exhaustive, mandatory system was extended as a result of European law.

A good illustration from the case law is a decision of the district court in Leeuwarden concerning the granting of a building permit for a pancake house near an area falling under the protection of the Birds Directive.<sup>20</sup> The court annulled the permit on the ground that the administrative authority had failed to observe due care and had failed to give adequate reasons for its decision, as it had paid insufficient attention to the relevant European law.<sup>21</sup> It seems that the court is thus neatly able to circumvent the exhaustive, mandatory system of the *Woningwet*. However, the question arises what the court would have decided if the administrative authority had taken European law into account. Would it have annulled the building permit then? My answer would be: Yes, it would. This was also the view of the district court in Zutphen,<sup>22</sup> where the issue was whether the granting of a building permit for 144 recreational bungalows was contrary to Article 6(3) of the Habitats Directive, given the effects on the Veluwe nature area, designated a special protection zone under both the Birds Directive and the Habitats Directive. The court observed that Article 6(3) of the Habitats Directive 'had direct effect and could consequently thwart the exhaustive system of grounds for refusal of Article 44 of the *Woningwet*.' As there was no question in this case of adverse effects within the meaning of Article 6(3) of the Habitats Directive, the appeal was held unfounded.

However, a decision of the *Raad van State* in interim injunction proceedings seems to suggest that the *Raad van State* may well think differently about extending the exhaustive, mandatory system by relying on European law.<sup>23</sup> In its provisional opinion, it held that there was insufficient ground for the view that the *Besluit luchtkwaliteit* (Air Quality Order) could prevent the granting of building permits where the requirements of Article 44 of the *Woningwet* were fulfilled.

#### *Application of European law by administrative authorities?*

Above it was observed that the *Raad van State* will annul a permit where an interested third party invokes European law, even where the permit was properly granted under the national assessment framework. From the case law of the European Court of Justice, in particular *Costanzo*, it emerges that there is another side to the possibility of invoking directly effective European

<sup>20</sup> *Rechtbank Leeuwarden* 25 October 2000, [2003] *M&R*, nr. 28, with note by Bastmeijer.

<sup>21</sup> See more extensively on this form of review: J.H. Jans, 'The Consequential Effect of European Law in Respect of the Requirement of Due Care' [2007] *Review of European Administrative Law*, pp. 63-72.

<sup>22</sup> *Rechtbank Zutphen* 4 January 2006, LJN: AV0543. This judgment also predates the special Habitats Directive test in the Nature Conservation Act; see section 2 above.

<sup>23</sup> *Raad van State* 28 October 2005, LJN: AU5387.

law before a national court.<sup>24</sup> Namely, the fact that administrative authorities are then also required to apply that same directly effective European law. In the words of the ECJ:

‘It is important to note that the reason for which an individual may [...] rely on the provisions of a directive in proceedings before the national courts is that the obligations arising under those provisions are binding upon all the authorities of the Member States.

It would, moreover, be contradictory to rule that an individual may rely upon the provisions of a directive which fulfil the conditions defined above in proceedings before the national courts seeking an order against the administrative authorities, and yet to hold that those authorities are under no obligation to apply the provisions of the directive and refrain from applying provisions of national law which conflict with them. It follows that when the conditions under which the Court has held that individuals may rely on the provisions of a directive before the national courts are met, all organs of the administration, including decentralized authorities such as municipalities, are obliged to apply those provisions.’<sup>25</sup>

Given this observation, it is reasonable to assume that the *Raad van State* would require administrative authorities to apply directly effective European law even if this meant extending the existing assessment framework of the permit system in question. Unfortunately, however, things are not that simple. Let us therefore examine a number of decisions of the *Raad van State* in more detail.

Take, for example, a decision of 7 December 2005.<sup>26</sup> The case concerned the refusal by the municipal executive of Boxtel to grant an environmental permit for a pig and cattle farm. The refusal was based on the increase of ammonia deposits in a Habitats Directive area. In other words, the local authorities felt obliged to refuse a permit to ensure that the Habitats Directive would not be infringed if it was granted. However, the legislation provided that, as regards decisions concerning an environmental permit for the establishment or change of a livestock farm, the competent authority should only determine the consequences of ammonia emissions from the animals’ quarters on the farm in the manner provided for by law. In this case it was clear that the system of the law allowed no room to refuse the

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<sup>24</sup> ECJ Case 103/88 *Fratelli Costanzo* [1989] ECR I839, para. 31, later confirmed in Case C-198/01 *Consorzio Industrie Fiammiferi* [2003] ECR I-8055.

<sup>25</sup> Cf. also para. 33 of *Fratelli Costanzo*: ‘that administrative authorities, including municipal authorities, are under the same obligation as a national court to apply the provisions of Article 29(5) of Council Directive 71/305/EEC and to refrain from applying provisions of national law which conflict with them’.

<sup>26</sup> *Raad van State* 7 December 2005, [2006] *M&R* nr. 19. Cf. also *Raad van State* 1 February 2006, LJN: AV0959.

permit. As regards the question whether the refusal could not then be based on the Habitats Directive the *Raad van State* observed:

'Given the wording of the law it was also not possible to interpret the law in the light of the wording and purpose of Article 6(3) of the Habitats Directive and base the contested decision on this interpretation. Nor could the respondent directly rely on Article 6(3) of the Directive vis-à-vis the appellant as a ground for refusing the permit, as no private individual has requested that in this case. It is established case law of the Court of the Justice of the European Communities that a directive cannot of itself impose obligations on individuals and that the provision of a directive cannot as such be relied upon vis-à-vis an individual (Judgments of 26 February 1986 *Marshall*, C-152/84 [1986] ECR 723; 14 July 1994 *Faccini Dori*, C-91/92 ECR I-3325 and 7 January 2004 *Wells*, C-201/02 [...]) This is precluded by the principle of legal certainty.'

Administrative authorities may not *themselves* refuse a permit as being contrary to the Habitats Directive unless a third party opposes the granting of the permit. The administrative authority must make its judgment based on the assessment framework set out in the national legislation. Adopting the Habitat Directive as a ground for refusal would, in the opinion of the *Raad van State*, amount to imposing obligations under the directive on an individual. In other words, the assessment framework of the national law remains effective and can only be extended where a third party relies on directly effective European law.

The case law of the *Raad van State*, as just discussed, amounts to the following: if an administrative authority grants a permit in accordance with the national assessment framework but contrary to a directly effective provision of a directive and a third party appeals against this, the *Raad van State* will annul the permit.<sup>27</sup> In other words, the speciality principle will not immunise the permit against annulment as being contrary to European law, even if the European rules contain a different assessment framework from the one in the permit system.

However, if the administrative authority applies the directly effective provision *itself* by refusing a permit and the permit holder appeals against this, the decision will be annulled because, according to the *Raad van State*, this would amount to a form of improper horizontal effect – at any rate, if no basis can be found in national law for such a refusal. Administrative authorities are thus faced with a difficult choice. If they apply national law and observe the speciality principle, the *Raad van State* will annul the decision as being contrary to the directive; if they apply European law, the *Raad van State* will annul the decision because they have ignored the national legal basis even though a directive cannot of itself be relied upon against individu-

<sup>27</sup> Cf. also *Raad van State* 15 March 2006, LJN: AV5036.

als. The *Raad van State*'s approach here has been severely criticised in the literature.<sup>28</sup>

Like these critics, I cannot agree with the line taken by the *Raad van State* either. The core of its position is that refusing a permit where the assessment framework of the national legislation will not allow its refusal on grounds of being contrary to a European directive would imply that the directive was being directly relied upon against an individual. And this would be contrary to the rule against horizontal effect of directives; at least this is how I understand the *Raad van State*'s reasoning. In my view this position cannot be implied from 'rock-hard case law' of the ECJ.<sup>29</sup> In *Wells*, the case cited by the *Raad van State*, there are on the contrary indications that the reverse may be true: negative consequences for the permit holder of failure to apply a too limited assessment framework cannot be regarded as a prohibited form of 'inverse direct effect'.<sup>30</sup> In my opinion it can be implied from *Wells* and the other case law of the ECJ that the ECJ only has a problem with the horizontal effects of provisions of directives when they have not been properly implemented, and with possible negative effects for individuals when the provisions in question are ones that are intended to create obligations for *individuals*, not when they are intended to create obligations for the *state*.<sup>31</sup>

Nor do I understand – assuming the *Raad van State* is right – why an administrative authority should be able to refuse a permit where a third party invokes a directly effective provision of a directive, but not otherwise. Why should there be no horizontal effect where a third party does not rely on such a provision, and why should legal certainty not be an issue? The implication is that the enforcement of European law is effectively placed in the hands of interested third parties, and administrative authorities are more or less compelled to take a decision (after all, they cannot refuse to do so) which is in effect an unlawful decision conflicting with a European directive.<sup>32</sup> This surely cannot be the intention of the rule against horizontal

<sup>28</sup> Cf. J.M. Verschuuren, 'Afdeling bestuursrechtspraak worstelt met rechtstreekse werking EG-richtlijnen', [2003] *NTer*, pp. 75-77 and H.F.M.W. van Rijswijk & R.J.G.M. Widdershoven, 'Een gemiste kans: de tijdelijke vergunning voor de lozing van zwarte-lijststoffen', [2002] *TvO*, pp. 232-233.

<sup>29</sup> The term '*keiharde jurisprudentie*' (rock-hard case law) is used by H.G. Sevenster, see J.M. Bazelmans & M.N. Boeve (red.), *Milieueffectrapportage naar huidig en toekomstig recht* (Groningen 2006), p. 61.

<sup>30</sup> The term is from ECJ Case C-201/02 *Wells* [2004] ECR I-723, para. 55.

<sup>31</sup> I refer here briefly to ECJ Case C-443/98 *Unilever Italia* [2000] ECR I-7535 and Joined Cases C-397/01 to C-403/01 *Pfeiffer* [2004] ECR I-8835. Cf. on *Pfeiffer* also the note by S. Prechal in [2005] *CMLRev.*, pp. 1445-1463. The judgment in Case C-144/04 *Mangold* [2005] ECR I-9981, also corresponds precisely with this view.

<sup>32</sup> Which, it may be assumed, would itself be a ground for a successful action for damages, based *inter alia* on European law (*Francovich* liability).

effect? Or does the *Raad van State* mean that where a third party relies on European law before a court the court will have to reward such reliance? But if this is what the *Raad van State* means, I wonder how this squares with the ECJ's view in *Fratelli Costanzo* and *Consorzio Industrie Fiammiferi* that administrative authorities are basically under the same obligation to apply provisions of directives as courts. Admittedly, there is no explicit ECJ case law from which it can be implied that administrative authorities are required under European law to apply directly effective European law *ex officio* (in other words without the intermediary of an interested party).<sup>33</sup> However, the view of the *Raad van State* that refusing a permit where the national assessment framework will not allow its refusal on the ground that it is contrary to a European directive would imply that the directive was being directly relied upon vis-à-vis an individual, cannot in my view be deduced from *Wells* or any other ECJ case law. In fact it would have made more sense to refer a question to the ECJ for a preliminary ruling on this key issue of the effect of European directives on national law.

## 5 Inapplicability for Breaches of Primary Community Law

The *Raad van State*'s main argument for not allowing application of directly effective European law to the detriment of a person directly affected is the rule against horizontal effect of directives. This argument is in any event not relevant where the administrative authority is required to apply directly effective primary Community law.

Consider the following example. A foreign company applies to the regional authority (*Gedeputeerde Staten*) for the province of Limburg for a permit under the *Ontgrondingswet* (Soil Removal Act) to extract river clay from the River Maas. If the permit were not granted, this might well be regarded as an obstruction of the free movement of goods (Article 29 EC) or services (Article 49 EC). It is quite clear from the case law of the ECJ that an administrative authority must take the functioning of the internal market into consideration when taking a decision.<sup>34</sup> It is possible that this could provide an argument for not refusing the permit in this case, on grounds of European law. Public interests other than those protected by the *Ontgrondingswet* would therefore have to form part of the assessment framework taken into consideration by the administrative authority.

This is further supported by the decisions of the *Raad van State* discussed above on the planting of Irish and UK mussel seed in the Eastern

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<sup>33</sup> See, by contrast, on *ex officio* application by judicial authorities the judgment in ECJ Case C-222/05 *Van der Weerd* [2007] ECR I-4233. Cf. on this judgment also the contribution of Engström to this volume of *REALaw*.

<sup>34</sup> See ECJ Case C-320/03 *Commission v. Austria* [2005] ECR I-9871.

Schelde. Our conclusion there was that the assessment framework of the *Natuurbeschermingswet*, focusing exclusively on conservation, is not extended by Article 28 EC Treaty though there was no need for this in those cases as the protection of the interests underlying Article 28 was provided by the *Visserijwet*. The question does however arise how the *Raad van State* would act – or would have to act – if for a certain activity only a permit under the *Natuurbeschermingswet* were necessary and to refuse it would be contrary to Article 28. In my view the administrative authority would then have to ignore the exclusive assessment framework of the *Natuurbeschermingswet* and avoid a conflict with Article 28 by granting the permit. Nor would this involve *détournement de pouvoir* (abuse of power), the other side of the speciality principle.

According to the classical view of the speciality principle public interests other than those provided for by the statutory permit system itself cannot play a part in decision-making, except when those public interests coincide with the interests of the applicant. However, European law requires that it (European law) and objectives related to it are taken into consideration in decision-making, in order to avoid administrative authorities taking decisions that conflict with primary Community law. This applies even if the administrative authority would thereby have to venture outside the national assessment framework.

## 6 Conclusion

The basic principle is that European law does not affect the speciality principle as it exists in Dutch administrative law. European law does not require that an administrative authority takes *all* directly effective European law into consideration when taking a decision. It does however require that situations are avoided where administrative authorities act in contravention of European law. In many cases it is possible to ‘stretch’ a too limited assessment framework by means of consistent interpretation, so that it is possible to take European law into account. However, where particular powers and other exclusive assessment frameworks are limited by legislation the doctrine of consistent interpretation has little to offer, because in that case the result would be a *contra legem* interpretation of the national assessment framework. And that is not what European law requires either. In this kind of situation all that remains is to apply the doctrine of direct effect.

On the basis of the case law of the *Raad van State* it is possible to draw the tentative conclusion that a *court* may disregard the speciality principle if a third party relies on directly effective European law. However, the same *Raad van State* does not regard it as admissible for an *administrative authority* to disregard the principle of its own accord, basing its decision on an assessment framework in a directive that departs from the national law frame-

work. The reasoning on which the *Raad van State* bases this view, derived from European law, is not convincing and cannot in my view be implied from the case law of the ECJ. The *Raad van State*'s view virtually compels administrative authorities to take decisions that conflict with European directives. This cannot in my view be the intention.

In other words, it is not true to say that it makes no difference whether the speciality principle is disregarded by consistent interpretation or direct effect, at least not where provisions of directives are concerned. Where consistent interpretation is used, it is national law that is applied in the end, and any problems regarding the horizontal effect of provisions of directives can be avoided. As discussed above, the *Raad van State* regards it as problematic where administrative authorities apply directly effective provisions of directives *ex officio* where this is to the detriment of a person directly affected. Where consistent interpretation is used, the basis for the administrative authority's decision is found in national law and so no directive is applied (horizontally or otherwise).

The rationale of the speciality principle is that administrative authorities should not, for reasons of legality and conformity to the rule of law, exercise public law powers which the legislature has not declared them competent to exercise. The view of the *Raad van State* that, where European law does not provide a basis for competence, administrative authorities may only base their powers on national law is one I share.<sup>35</sup> But this does not mean, as the *Raad van State* apparently believes, that administrative authorities are obliged to grant permits contrary to European law if national law does not supply grounds for refusal. This does not serve the legality of the administration. Consequently, where a rule of European law requires that certain interests are taken into consideration, the speciality principle cannot be applied in full.

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<sup>35</sup> Cf. also *Raad van State* 11 January 2006, [2006] *NJB*, nr. 265.



